99-639

No. _____

In The

Supreme Court of the United States

October Term, 1999

CIRCLE INDUSTRIES USA, INC.,

Petitioner,

v.

PARKE CONSTRUCTION GROUP, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

Whether an inactive corporation, whose only activity is engaging in a law suit, has a principal place of business in the state from which it is prosecuting that law suit.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were the petitioner, Circle Industries USA, Inc., and the respondent, Parke Construction Group, Incorporated.

RULE 29.6 STATEMENT

Petitioner, Circle Industries USA, Inc., does not have a parent corporation or a publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Circle Industries USA, Inc (Circle)., respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit, decided July 15, 1999, which affirmed the United States District Court for the Eastern District of New York's (Johnson, J.) denial of Circle's motion to remand this action to the Supreme Court of the State of New York, County of Nassau and the District Court's judgment confirming an arbitration award. The Court of Appeals also reversed the District Court's order that granted attorneys' fees to Respondent Parke Construction Group, Incorporated (Parke), pursuant to 28 U.S.C., § 1447(c).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Circle Industries USA, Inc. v. Parke Construction Group, Incorporated,* 183 F.3d 105 (2nd Cir. 1999) (App. A). The opinion of the United States District Court for the Eastern District of New York is not officially reported, but can be found at 1998 WL 713305 (App. B).

BASIS FOR JURISDICTION

The Judgment and Decree of the United States Court of Appeals for the Second Circuit was issued on August 5, 1999. This Court has jurisdiction to review the decree and judgment of a court of appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332(c)(1) provides in pertinent part:

(c) For the purposes of this section and section 1441

of this title–

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business ...

28 U.S.C. § 1441(a) provides, in pertinent part:

(a) Except as otherwise provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(b) provides, in pertinent part:

(b) ... Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF THE CASE

A. Introduction

This case presents an opportunity for this Court to settle a basic issue of federal jurisdiction. For purposes of diversity jurisdiction, a corporation is a citizen of the State by which it has been incorporated and the State in which it has its principal place of business, 28 U.S.C. § 1332(c)(1) If a corporation is inactive, what test shall be used to determine the State in which it has its principal place of business, if any. Surprisingly, this issue has not been long ago settled. Four Courts of Appeals have reached three different answers to the problem during the past decade. A final

ruling from this Court would be helpful to the District Courts and the Courts of Appeals in deciding cases that arise under the diversity jurisdiction statute, 28 U.S.C. § 1332, and the removal jurisdiction statute, 28 U.S.C. § 1441.

B. Statement of Facts

On July 1, 1993, Circle, of Garden City Park, New York, and Parke, of Marietta, Georgia, became joint venturers to perform certain carpentry and dry wall construction work in the Atlanta, Georgia metropolitan area. A Joint Venture Agreement was executed, Joint Appendix filed in the Second Circuit, page 48 (A48). The Joint Venture was called Parke Construction/Circle USA. During its brief life the Joint Venture worked on several construction projects in the Atlanta, Georgia area. Its most important job was the University Apartments job, the Olympic Village Dorms. This was a $6,900,000.00 job and ran from November of 1994 until July of 1996. This job made the greatest contribution to the break up of the Joint Venture and the disputes that have led to one arbitration; two legal actions; an appeal and this Petition.

> "Between 1993 and the fall of 1995, Parke's registered office was located in Georgia and its registered agent, Greg Lubonty, resided there. In the spring of 1995, the parties agreed to phase out the joint venture, and Parke performed its last construction work in Georgia in the fall of 1995. Parke also closed its office in Georgia at that time. The corporation's registered agent, Lubonty, then left the state, and all mail addressed to Park was forwarded to Parke's president, John Bowe, in New York. Parke's activity since late 1995 has been limited to collecting its various accounts in Georgia and prosecuting this action in New York." 183 F.3d 105, 107.

After an unsuccessful attempt, during the summer of 1995, by Parke to obtain an injunction against Circle in the United States District Court for the Northern District of Georgia, the parties agreed to arbitrate their disputes before the American Arbitration Association (AAA) in New York, as required by their Joint Venture Agreement.

An arbitrator was appointed by the AAA, and hearings were held at the Manhattan offices of the AAA. Over a period of many months, several days of hearings were held, the last of which was held on November 11, 1996. No transcript of the proceedings was made.

On April 23, 1997, the arbitrator issued his award in favor of Parke in the amount of $146,590.00, plus interest (A139). On May 6, 1997, Circle brought a special proceeding in the Supreme Court of the State of New York, County of Nassau, to vacate the arbitrator's award. On June 5, 1997, Parke removed the action to the United States District Court for the Eastern District of New York, Civil Action Number 97 Civ. 3334 (SJ). Parke alleged that it was formed under the laws of the State of Georgia and that its principal place of business was located in Georgia.

On July 10, 1997, Circle made a timely motion to remand the case to the New York State Supreme Court (A11). Circle's motion was based on essentially uncontradicted evidence that since 1995, Parke's only operating agent, John Bowe, has been operating in New York; Parke's mail is being sent to John Bowe in New York; it is likely that Parke's books and records are located in New York; all major decisions are being made by John Bowe in New York. In short, all of Parke's activities are taking place in New York (A13) and that Parke's only place of business was in the State of New York. Since Parke and Circle were both citizens of New York, Circle claimed that there was no diversity jurisdiction and that the matter was improvidently removed. Of course, if Parke was a citizen of New York, the case would not have been removable under 28 U.S.C. § 1441(b) as well as 28 U.S.C. § 1441(a).

On September 15, 1997, Judge Johnson issued an Order providing, without explanation, that diversity existed between the

parties and awarding attorney's fees to Parke (A41).

On June 13, 1997, Parke moved to dismiss Circle's petition to vacate the award and to confirm the award. The Court's Memorandum and Order of October 8, 1998, denied Circle's petition to vacate the award and granted Parke's motion to confirm the award, 1998 WL 713305 (E.D.N.Y.), (App.B). Circle appealed (A234).

On July 15, 1999, the United States Court of Appeals for the Second Circuit issued its decision in Docket No. 98-9539. It reversed the District Court's award of attorneys' fees, 183 F.3d 105, 110. It affirmed the District Court's denial of Circle's motion to remand and its judgment confirming the arbitration award, 183 F.3d 105, 110.

REASONS FOR GRANTING THE WRIT

1. The Petition Should Be Granted As Four United States Courts Have Entered Conflicting Decisions On The Same Important Matter

The view of the Second Circuit is expressed in *Pinnacle Consultants, Ltd. v. Leucadia National Corp.*, 101 F.3d 900, 907 (2nd Cir. 1996) and *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 141 (2nd Cir. 1991). An inactive corporation's principal place of business is the state in which the inactive corporation last transacted business. This is so regardless of the period of time that the corporation has been inactive. Participating in a law suit in New York and directing that law suit from New York, do not constitute transacting business for the purposes of diversity jurisdiction.

The Third Circuit takes an equally rigid, but opposite position. An inactive corporation has no principal place of business and is only a citizen of its State of incorporation, see *Mid Atlantic National Bank v. Hansen*, 48 F.3d 693, 696 (3rd Cir. 1995).

The Fourth and Fifth Circuits apply a "facts-and-circumstances" test. In *Athena Automotive, Incorporated v.*

DiGregorio, 166 F.3d 288 (4th Cir. 1999), the Fourth Circuit expressly rejected the views of both the Second and the Third Circuits.

> "Because we are required to view the corporation's citizenship for purposes of diversity jurisdiction at the time the action is commenced, we cannot categorically conclude that an inactive corporation is a citizen of its last place of business, as the Second Circuit concluded in Wm. Passalacqua, 933 F.2d at 141. On the other hand, to adopt a 'bright-line' rule, as announced by the Third Circuit in Hansen, 48 F.3d at 696, that a corporation inactive at the commencement date of the litigation has no place of business and is therefor only a citizen of its state of incorporation could overlook the realities of a corporation's business activities and their geographical nexus, yielding a result demonstrably at odds with the statute." 166 F.3d 288, 291.

The Fourth Circuit in *Athena, supra,* has adopted the Fifth Circuit's "facts- and- circumstances" position, as set forth in *Harris v. Black Clawson Co.*, 961 F.2d 547, 551 (5th Cir. 1992).

> "These observations prompt us to emphasize that determinations of a corporations principal place of business must be made on a case by case basis. And a court must analyze the facts of each case to determine as of the date the action was commenced whether a corporation's business activity was sufficient to make it a citizen of the state of such activity." 166 F.3d 288, 291.

The Fourth and Fifth Circuits regard the winding up activities of an inactive corporation as a relevant factor in determining if the inactive corporation has a local presence in a

given locale. The Fourth and Fifth Circuits examine the period of the inactivity as a relevant factor. The Fourth and Fifth Circuits consider the conduct and direction of litigation as a relevant factor. In fact, at the very end of the *Athena, supra,* decision, the Court stated, as *dicta*, that if a corporation's only activity was pursuing a litigation, it's principal place of business would be the state from which it was conducting the litigation, see 166 F.3d 288, 292. In other words, in the instant matter, if had been decided by the Fourth Circuit rather than the Second Circuit, the Court would have reversed the District Court on the remand issue.

2. The Petition Should Be Granted As The Decision Of The Second Circuit Does Not Effectuate The Purposes Of Either The Diversity Or The Remand Statutes

The Federal District Courts are courts of limited jurisdiction. The District Court "is of limited jurisdiction; and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small portion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is ... that a cause is without its jurisdiction, unless the contrary appears." *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 7, 11 (1799).

All courts are concerned with determining their jurisdiction. As a result of their limited jurisdiction, Courts of the United States are particularly required to determine jurisdiction as a threshold matter. Diversity jurisdiction is one of the two main branches of District Court jurisdiction and determining its limits would seem to be of signal importance.

The often cited reason for providing for diversity jurisdiction and for allowing removal to the federal courts is to provide protection to certain defendants from the possible local prejudices of the state courts.

> "As seems to be true of the original diversity of citizenship jurisdiction of the federal courts, the right of removal probably was designed to protect

> nonresidents from the local prejudice of state courts." Wright & Miller, Federal Practice and Procedure, 14B, Chapter 7, Section 3721. See also *Barrow S.S. Co. v. Kane,* 170 U.S. 100, 111, 18 S.Ct. 526, 530, 42 L.Ed. 964 (1898) and Wright & Miller, Federal Practice and Procedure, 13B, Chapter 3, Section 3601.

The Second Circuit position is wrong precisely because it ignores the local prejudice factor. The Second Circuit insists on assigning citizenship to an inactive corporation, in the state where it last transacted business, without regard to how recently business was transacted. In the instant action, Parke is considered to be a Georgia citizen even though it has been totally absent from Georgia since 1995.

Let us assume for the moment that Parke was not incorporated in Georgia. If Circle sued Parke in state court in Georgia, does it make sense to treat Parke as a Georgia citizen and deny Parke the right of removal? Parke's defense would be directed from New York by a New Yorker. Yet the Second Circuit position would deny Parke the protection of a federal court forum. Continuing the same assumptions, if Circle sued Parke in state court in New York, Parke would be able to remove to federal court, even though Parke's defense would be directed from new York, by a New Yorker. The wrong test leads to the wrong results.

The Second Circuit's position is further indicted by its refusal to allow the direction of a law suit as a factor in deciding where a corporation is transacting business. There is no logic in simply excluding this as a factor. In the instant matter, if the Second Circuit had given some regard to Parke's direction of this litigation from New York, it could have lead to a different result on the issue of the remand to State Court.

The Second Circuit position fails to give the proper regard to viewing the facts of diversity and removal as of the time an action commences and as of the time it is removed, see *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428, 111 S.Ct. 858, 112 L.Ed.2d 951 (1991). By viewing the citizenship issue as

foreclosed and unaffected by the passage of time, the Second Circuit is giving undue weight to facts that were in existence at a time other than when the action was commenced or removed. Once again, the wrong test will lead to wrong results.

CONCLUSION

This case presents a question of importance, whether an inactive corporation, whose only activity is engaging in a law suit, has a principal place of business in the state from which it is prosecuting that law suit. This case presents an opportunity for this Court to resolve a conflict involving four Courts of Appeals holding three different positions.

If the petition is granted, this Court can correct the errors that allowed this case to remain in the federal court system when all the parties were actually citizens of New York. This Court can direct that this case be remanded to the Supreme Court of the State of New York, County of Nassau.

Circle Industries USA, Inc., respectfully requests that its petition for a writ of certiorari be granted.

Dated: Huntington, New York
October 7, 1999

Respectfully submitted,

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APPENDIX A

183 F.3d 105, *; 1999 U.S. App. LEXIS 15950, **

CIRCLE INDUSTRIES USA, INC.,
Plaintiff-Appellant,

v.

PARKE CONSTRUCTION GROUP, INCORPORATED,
Defendant-Appellee.

Docket No. 98-9539

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

183 F.3d 105; 1999 U.S. App. LEXIS 15950

June 9, 1999, Argued July 15, 1999, Decided

PRIOR HISTORY: [**1] Appeal from an order and final judgment of the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., Judge) denying plaintiff-appellant's motion to remand this action to state court, awarding defendant-appellee attorneys' fees pursuant to 28 U.S.C. §1447(c) for opposing the remand, and confirming an arbitration award rendered in favor of defendant-appellee.

DISPOSITION: Affirmed in part and reversed in part.

CORE TERMS: arbitrator, arbitration award, removal, joint venture, vacatur, vacate, principal place of business, diversity of citizenship, opportunity to review, transacted, duplicate, diversity,

opposing, registered, Commercial Arbitration Rules, subject matter jurisdiction, transacting business, accounts receivable, judgment confirming, final judgment, fees incurred, incorporation, confirmation, citizenship, duplication, confirming, inactive, revision, glanced, qualifies

COUNSEL: JEFFREY S. DUBIN, Law Office of Jeffrey S. Dubin, Garden City, NY, for plaintiff-appellant.

ROBERT MAHONEY, Friedman Siegelbaum LLP, Roseland, NJ (Lindsey H. Taylor, on the brief), for defendant-appellee.

JUDGES: Before: LEVAL and SOTOMAYOR, Circuit Judges, and POLLACK, * District Judge.

* The Honorable Milton Pollack, District Judge of the United States District Court for the Southern District of New York, sitting by designation.

OPINIONBY: SOTOMAYOR

OPINION:

[*106] SOTOMAYOR, Circuit Judge:

Plaintiff-appellant Circle Industries USA, Inc. ("Circle") initially brought this action in the Supreme Court of the State of New York, County of Nassau, suing to vacate an arbitration award rendered in favor of defendant-appellee [**2] Parke Construction [*107] Group, Inc. ("Parke"). When Parke removed the case to the District Court for the Eastern District of New York, Circle moved to remand the action to state court. On September 15, 1997, the district court (Johnson, J.) found that federal jurisdiction existed on the basis of diversity of citizenship and denied Circle's motion to remand. The district court also ordered Circle to pay the attorneys' fees incurred by Parke in opposing the remand motion. On October 23, 1998, the district court entered a final judgment

confirming the challenged arbitration award. For the reasons to be discussed, we affirm the district court's denial of Circle's motion to remand as well as its judgment confirming the arbitration award, but reverse the district court's grant of attorneys' fees to Parke under 28 U.S.C. § 1447(c) (1994).

BACKGROUND

Circle is a New York corporation with its principal place of business in New York. Parke was incorporated in Georgia in 1993 for the sole purpose of entering into a joint venture with Circle to work on several construction projects in the Atlanta metropolitan area. Between 1993 and the fall of 1995, Parke's registered [**3] office was located in Georgia and its registered agent, Greg Lubonty, resided there. In the spring of 1995, the parties agreed to phase out the joint venture, and Parke performed its last construction work in Georgia in the fall of 1995. Parke also closed its office in Georgia at that time. The corporation's registered agent, Lubonty, then left the state, and all mail addressed to Parke was forwarded to Parke's president, John Bowe, in New York. Parke's activity since late 1995 has been limited to collecting its various accounts in Georgia and prosecuting this action in New York.

This litigation arose from a dispute over Circle's alleged wrongful diversion of money from the joint venture. Parke filed suit against Circle in federal district court in Georgia, seeking injunctive relief. That action was dismissed when the parties submitted their dispute to binding arbitration before an arbitrator from the American Arbitration Association ("the AAA") in New York, as required under the terms of the joint venture agreement.

In November of 1996, the arbitrator conducted a five-day hearing on the parties' claims. During the proceedings, Circle introduced twenty-eight exhibits and Parke twenty-seven, [**4] each of which was marked as an exhibit personally by the arbitrator upon submission. The arbitrator reviewed some of the exhibits as they

came into evidence and glanced cursorily at others. On March 25, 1997, after the parties submitted post-hearing briefs, the arbitrator declared the proceedings closed and informed the parties that he would render a decision within the next month.

On April 14, 1997, an AAA administrator contacted counsel for the parties to request duplicate copies of the exhibits, explaining that the AAA could not locate the original exhibits. After receiving copies from Parke's counsel, the AAA informed Circle that it was forwarding these copies to the arbitrator. Circle objected that it had not had an opportunity to review Parke's submissions and, on April 18, faxed the AAA to request that the arbitrator "schedule a proceeding at which both sides may review and submit the required Exhibits." The fax further stated: "Circle's Exhibits, which were lost by the Association, are voluminous. Please have the arbitrator submit a list of which exhibits he does not have, so that we do not have to unnecessarily produce Exhibits." Parke's counsel also faxed a letter to the [**5] AAA on the same day, confirming that Parke had supplied only those exhibits originally admitted into evidence and stating that Parke would object to Circle's submission of any documents not admitted at the hearing. The AAA responded to neither party's letter. On April 23, 1997, the arbitrator entered a $ 146,590.00 award in favor of Parke, along with $ 3,144.06 for AAA fees and expenses.

[*108] On May 6, 1997, Circle filed this petition in the Supreme Court of New York, County of Nassau, seeking to vacate the arbitration award on the basis of alleged procedural errors in the arbitrator's handling of the misplaced exhibits. Parke subsequently removed the action to the United States District Court for the Eastern District of New York and cross-moved to confirm the award. Circle then moved to remand the case to state court, claiming lack of diversity of citizenship between the parties. The district court denied Circle's remand motion and ordered Circle to pay $ 2,493.89 to cover the attorneys' fees Parke incurred in opposing the motion. The court also issued an order denying

Circle's petition to vacate the arbitration award and granting Parke's cross-motion to confirm the award.

DISCUSSION [6]**

I. Diversity of Citizenship

A defendant is entitled to remove a state court action to federal court on the basis of diversity of citizenship between the parties, provided that the defendant is not a citizen of the forum state. See 28 U.S.C. § 1441(b) (1994). For purposes of diversity jurisdiction, a corporation is a citizen of its state of incorporation and of the state that serves as its principal place of business. See 28 U.S.C. § 1332(c) (1994). Because it is undisputed that Parke is incorporated in Georgia, removal was proper unless New York qualifies as Parke's principal place of business.

In *Pinnacle Consultants, Ltd. v. Leucadia National Corp.*, 101 F.3d 900, 907 (2d Cir. 1996), this Court held that an inactive corporation's principal place of business is the state in which it last transacted business. *See also Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 141 (2d Cir. 1991) ("When a corporation has ceased business activity, diversity jurisdiction . . . is determined not only by its state of incorporation, but also by the place it last transacted [**7] business"). Since 1995, Parke has been inactive, engaged only in winding down its affairs in Georgia by hiring an attorney to collect its accounts receivable in that state and in defending itself in this New York action. Although Parke's sole officer and director presently lives in New York and he receives the corporation's mail there, these contacts do not alter its citizenship because the corporation is not transacting business through these activities. Circle's only other possible argument that Parke last transacted business in New York rests on the fact that Parke is engaged in this legal action. In *Passalacqua*, however, this Court did not find that participating in a lawsuit in New York qualifies as "transacting business" for jurisdictional purposes. *See 933 F.2d at 131, 141.* We see no

reason to revisit that issue on the facts presented here.

The joint venture in this case did business only in Georgia, last operated an office in Georgia, and hired lawyers in Georgia to collect its remaining accounts receivable. For diversity purposes, then, Parke is thus a citizen only of Georgia.

II. Award of Attorneys' Fees

Under 28 U.S.C. § 1447 [**8] (c), a district court may award attorneys' fees when it remands a case to state court based on lack of subject matter jurisdiction:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

(Emphasis added.)

Although this statutory language clearly provides for attorneys' fees in connection with an order of remand, nothing in the statute allows for a grant of attorneys' fees where, as here, the defendant successfully resists such an order. It is quite understandable that the statute should provide counsel fees for the grant of a motion to remand an improperly removed [*109] case but not for the denial of such a motion. The commentary to the 1988 revision of the statute emphasizes that its goal is to deter improper removal. See id., Commentary on 1988 Revision by David D. Siegel. Removal is done ex parte and without need of a court order. A defendant removes a case from state court to federal court simply by filing a signed notice of removal [**9] in the United States district court. See 28 U.S.C. § 1446(a). While the simplicity of this procedure facilitates removal, it also exposes a plaintiff to the

possibility of abuse, unnecessary expense and harassment if a defendant removes improperly, thereby requiring plaintiff to appear in federal court, prepare motion papers and litigate, merely to get the action returned to the court where the plaintiff initiated it. Providing for attorneys' fees when granting a motion to remand serves the purpose of deterring improper removal, whereas awarding fees when denying a motion for remand does not.

While it is true that § 1447(c) "affords a great deal of discretion and flexibility to the district courts in fashioning awards of costs and fees," Morgan Guar. Trust Co. v. Republic of Palau, 971 F.2d 917, 924 (2d Cir. 1992), that discretion extends only so far as the statutory mandate. Because the statute does not authorize courts to award attorneys' fees when upholding a removal, the district court erred by requiring Circle to pay Parke's attorneys' fees incurred in successfully opposing the remand.

III. Confirmation of the Arbitration Award [**10]

Circle argues that the arbitrator violated AAA Commercial Arbitration Rules 29, 31 and 32 by failing to designate particular Circle exhibits for duplication and resubmission and by accepting Parke's duplicate exhibits without giving Circle an opportunity to review the submissions.[1] Violation of AAA Rules can, under

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[1]Commercial Arbitration Rules 29, 31 and 32 of the American Arbitration Association state in pertinent part:

> 29. Order of Proceedings and Communications with Arbitrator . . . The arbitrator has the discretion to vary this procedure but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence.
>
> 31. Evidence . . . The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. . .
>
> . . . All evidence shall be taken in the presence of all of the

certain circumstances, require vacatur of an arbitration award. See 9 U.S.C. §10(a)(3) (requiring vacatur "where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"); id. at § 10(a)(4) (requiring vacatur "where the arbitrators exceeded their powers"). The party seeking to vacate the award bears the heavy burden of demonstrating sufficient grounds for vacatur. See *Folkways Music Publishers v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993). We hold that Circle has not met this burden here and affirm the confirmation of the arbitration award for substantially the same reasons discussed by the district court.

In brief, we conclude that Circle was given a full opportunity to review Parke's exhibits when those exhibits were entered into evidence at the hearing. Circle has proffered nothing but speculation that the duplicate exhibits submitted to the arbitrator by Parke included any new or improper materials. We further conclude that [*110] Circle has failed to prove that the arbitrator refused to consider material evidence in rendering his decision. The arbitrator, who by Circle's own concession had reviewed some of the exhibits and glanced at others during the hearing, did not respond to Circle's letter requesting the specification of particular exhibits needed for duplication. This failure to respond suggests either that the arbitrator ultimately did not require any of the exhibits in making his decision, or, as the district court noted, "that in the end, either the AAA or the arbitrator did discover the

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arbitrators and all of the parties, except where any of the parties is absent in default or has waived the right to be present.

32. Evidence by Affidavit and Posthearing Filing of Documents or Other Evidence . . . If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine such documents or other evidence.

missing documents and review them before issuing his award." *Circle Indus., USA, Inc. v. Parke Constr. Group*, No. 97-CV-3334(SJ), 1998 WL 713305, at *6 (E.D.N.Y. Oct. 8, 1998). Circle thus has failed to establish a violation of the AAA rules sufficient to require vacatur of [**12] the award.

CONCLUSION

For the foregoing reasons, we affirm the district court's denial of Circle's motion to remand this action and its judgment confirming the arbitration award. We reverse, however, that portion of the district court's order that granted attorneys' fees to Parke pursuant to 28 U.S.C. § 1447(c).

1998 U.S. Dist. LEXIS 22281, *

CIRCLE INDUSTRIES USA, INC.,

Petitioner,

-vs-

PARKE CONSTRUCTION GROUP, INC.,

Respondent.

97 CV 3334 (SJ)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

1998 U.S. Dist. LEXIS 22281

October 8, 1998, Decided October 14, 1998, Filed

DISPOSITION: [*1] Circle's petition to vacate the arbitration award dismissed and Parke's motion for confirmation of the arbitration award granted. Final judgment entered in favor of Parke in the amount of $ 146,590.00 plus interest at the rate of eight percent (8%) per annum from the date of the award to the date of the payment, which represents the award rendered by the AAA.

CORE TERMS: arbitrator, arbitration, choice-of-law, marked, duplicate, hear, joint venture agreement, arbitration award, vacatur, joint venture, misconduct, interstate commerce, post-hearing, confirm, box, confirmation, personally, arbitrator exceeded, fair hearing, consequentially, aforementioned, fundamentally, documentary, violating, inclusion, supervise, progress, venture, inspect, subject matter jurisdiction

COUNSEL: JEFFREY S. DUBIN, ESQ., Garden City, New York, for Petitioner.

Robert Mahoney, Esq., FRIEDMAN SIEGELBAUM, LLP, Roseland, New Jersey, for Respondent.

JUDGES: Sterling Johnson, Jr., U.S.D.J.

OPINIONBY: Sterling Johnson, Jr.

OPINION: MEMORANDUM & ORDER

JOHNSON, District Judge:

Petitioner, Circle Industries USA Inc. ("Circle") commenced this action for vacatur of an arbitrator's award rendered against it and in favor of respondent, Parke Construction Group Inc. ("Parke"). Parke moves to dismiss Circle's motion and to confirm the arbitrator's award. Circle's petition alleges violation of the rules of the American Arbitration Association ("AAA") and argues that these violations constitute "misconduct" under statutory provisions dealing with the vacatur of arbitration awards. Parke counters that the arbitrator's conduct was not improper, [*2] and thus the arbitration award should be confirmed. For the reasons set forth below. Parke's motion is granted.

BACKGROUND

On July 1, 1993, Circle entered into a joint venture agreement with Parke. The agreement related to prospective construction work in Atlanta, Georgia. At the time the instant litigation was initiated, Circle was a corporation organized under the laws of the State of New York, with its principal place of business located in Garden City. New York. Parke is a Georgia Corporation. John T. Bowe ("Bowe"), the Chief Executive Officer of Parke, maintains his residence in New York, and the discussions that resulted in the formation of the joint venture were conducted for the most part in

New York. The venture necessitated frequent interstate travel by Bowe, to Georgia, to supervise the joint venture's progress. Eventually, a dispute arose between the parties. The joint venture agreement provides that "all claims and controversies" that arise in connection with the joint venture "shall be settled by binding arbitration." (Declaration of Robert Mahoney "Mahoney Decl." Ex. A, P 11). The joint venture agreement goes on to specify the AAA as the designated arbitrators [*3] to resolve any such controversies. In accordance with the joint venture agreement, the dispute was submitted to arbitration.

The arbitrator conducted five days of hearings, the last of which took place on November 11, 1996. During the course of the hearings, the arbitrator heard testimony from seven witnesses and received into evidence twenty-eight exhibits offered by Circle and twenty-seven exhibits offered by Parke. Circle's exhibits consisted of three and one-half boxes of documents. Parke presented one half of a box of documents. The arbitrator personally marked each of the exhibits as they were submitted. He reviewed certain documents as they were introduced and gave a cursory glance at others.

At the conclusion of the hearings, a briefing schedule was established by the arbitrator. It was agreed that the four boxes of exhibits would be kept at the AAA offices for use by the parties while they drafted their briefs. It was further agreed that after the post-hearing briefs were submitted, the AAA would transmit the four boxes of exhibits to the arbitrator so that they would be available to him while considering and drafting his award.

The initial post-hearing briefs were submitted [*4] by the parties in December of 1996. Reply briefs were filed in February of 1997. On March 25, 1997, counsel for both parties were notified by the AAA that the arbitrator had declared the proceedings closed, and would render a decision by April 24, 1997.

On April 14, 1997, an AAA case administrator contacted counsel

for both parties and stated that the arbitrator was requesting duplicate copies of each side's exhibits. According to an affidavit by Circle's counsel, the case administrator explained to him by telephone that she could not locate "any of the exhibits." (Affidavit of Jeffrey S. Dubin "Dubin Aff." P 21). Counsel for Parke agreed to supply duplicate copies of Parke's exhibits. On April 17, 1997, the AAA informed Circle's counsel that it had received Parke's duplicates and intended to transmit them to the arbitrator. (Dubin Aff. Ex. D). On April 18, Circle's counsel sent the following fax to the AAA:

> Circle Industries USA, Inc., objects to the submission of so called "Exhibits" to the arbitrator by Parke Construction that have not been reviewed by Circle Industries USA, Inc. The arbitrator is respectfully requested to schedule a proceeding at which both sides may review [*5] and submit the required Exhibits.
>
> Circle's Exhibits, which were lost by the Association, are voluminous. Please have the arbitrator submit a list of which exhibits he does not have, so that we do not have to unnecessarily produce Exhibits.

(Dubin Aff. Ex. E). Parke's counsel, who had already forwarded duplicates of his client's exhibits, also faxed a letter to the AAA on April 18, 1997. That letter stated:

> I received your letter of April 15, 1997. I would like to confirm that the only documents which the arbitrator has requested are those which were marked into evidence at the hearing. There were numerous other documents, which were not marked as exhibits. I would object to the introduction of any of those documents to the arbitrator at this time. My records indicate that Circle introduced Twenty-eight exhibits (C-1 to C-28). Please insure that

only the marked exhibits are transmitted to the arbitrator.

(Mahoney Decl. Ex. H).

The AAA did not respond to either of the two communications by counsel. Rather, on April 23, 1997, the arbitrator entered an award in favor of Parke in the amount of $ 146,590.00 plus $ 3,144.06 for the fees and expenses of the AAA.

Circle [*6] now petitions this Court to vacate the arbitrator's award on two grounds. First, Circle argues that by accepting documents from Parke that were never reviewed by Circle, the arbitrator violated AAA Rules 31 and 32.[1] Second, by not allowing Circle the opportunity to resubmit its exhibits, Circle contends that the arbitrator refused to hear material evidence, thereby violating AAA Rules 29 and 31.[2] Circle further argues

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[1]Rules 31 and 32 of the American Arbitration Association state in pertinent part:

31. Evidence... All evidence shall be taken in the presence of all the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

32. Evidence by Affidavit and Posthearing Filing of Documents or Other Evidence... If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine such documents or other evidence. [*7]

[2]AAA Rules 29 and 31 state in pertinent part:

29. Order of Proceedings and Communications with Arbitrator ... The arbitrator has the discretion to vary this procedure but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence.

31. Evidence ... The Parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator

that these alleged violations of AAA rules translate into two discrete statutory grounds justifying vacatur of the arbitrator's award: (1) "misconduct in procuring the award" pursuant to New York CPLR 7511(b)(1)(i); and (2) "Exceeding of powers granted to the arbitrator" pursuant to CPLR 7511 (b)(1)(iii).[3]

In response to Circle's petition, Parke moves to dismiss Circle's petition and for confirmation of the arbitrator's award. Parke argues that the AAA rules that give each party a right to review evidence submitted by their opponent are inapposite here. Those rules, Parke asserts, were designed to address the presentation of new evidence, meaning evidence that had [*8] not already been submitted during the hearings. By contrast, the arbitrator in the case at bar merely requested duplicates of evidence that had already been submitted and personally marked into evidence by the arbitrator at the hearings. Given that the parties were simply asked to resubmit copies of documents already marked into evidence, Parke states there was no need to allow each party to examine the other party's exhibits. Parke notes also that Circle has not put forth any evidence to suggest that Parke attempted to sneak any documents into evidence.

Regarding Circle's contention that the arbitrator's actions amount to a refusal to hear its evidence, Parke responds that Circle had ample opportunity to present its evidence and witnesses over the five days of hearings and in the post-hearing briefs. Moreover, Parke asserts that the only reasonable inference that can be drawn from the arbitrator's decision not to pursue Circle after it initially declined to produce duplicates of its documents, is that the arbitrator did not need to review Circle's exhibits any further in

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may deem necessary to an understanding and determination of the dispute.

[3]The joint venture agreement states in P 11. E that "any arbitration proceeding taking place as a consequence of this Agreement shall be conducted according to the rules then obtaining of the American Arbitration Association."

order to render his award.

DISCUSSION

I. Applicable Law

"The Federal Arbitration Act applies when [*9] there is federal subject matter jurisdiction, i.e., diversity jurisdiction . . . and when the contract calling for arbitration 'evidences a transaction involving interstate commerce'" *Barbier v. Shearson Lehman Hutton* 948 F.2d 117, 120 (2d Cir. 1991) (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)).

In the case at bar, both of these criteria have been satisfied. First, federal subject matter jurisdiction is present here because there is diversity of citizenship between the respective litigants. See *Circle Indus. USA, Inc. v. Parke Constr. Group, Inc.*, 97 CV 3334 (order dated Sept. 15, 1997). The second requirement, that the contract relate to a transaction involving interstate commerce, has likewise been met. In *Pennsylvania Eng. Corp. v. Islip Resource Recovery Agency*, 710 F. Supp. 456, 460 (E.D.N.Y. 1989), the Court held that a construction project to be built on Long Island, New York by a Delaware corporation "affected interstate commerce." Similarly, in the instant case, Circle, a New York corporation entered into a joint venture with Parke, a Georgia [*10] corporation to do construction work in Atlanta, Georgia. Furthermore, the venture necessitated frequent interstate travel on the part of Bowe between New York and Georgia, to supervise the joint venture's progress. Thus the joint venture agreement created "an ongoing commercial relationship involving parties from different states." Mosca v. Doctors Assocs. Inc., 852 F. Supp. 152, 154 (E.D.N.Y. 1993). Consequently, the joint venture affected interstate commerce within the meaning of the Federal Arbitration Act (the "F.A.A.").

Notwithstanding the fact that the aforementioned standards were

met, it does not necessarily follow that the F.A.A. is the governing law in this case. In its brief, Circle cites *Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 479, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989) for the proposition that, in passing the F.A.A., it was not Congress' intent to nullify an agreement by the contracting parties to arbitrate their dispute under the local arbitration rules of a particular state. In that case, the Supreme Court applied state arbitration law, rather than the F.A.A.. However, Circle [*11] fails to note that in holding that the parties' agreement incorporated California state arbitration rules, the *Volt* decision relied on the California state court's construction of the parties' agreement. Id. at 474-76. In the present action, by contrast, this Court must interpret the parties' contract de novo, without a state court's prior interpretation. How courts should deal with such a situation, a question left open in *Volt*, was decided by the Supreme Court in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 131 L. Ed. 2d 76, 115 S. Ct. 1212 (1995).

In *Mastrobuono*, the parties had included a clause in their contract, providing that any disputes arising out of the contract be submitted to arbitration. The contract also contained a clause stating that it was "governed by the laws of the State of New York." Id. at 58 n.2. Shearson argued that this choice-of-law clause evidenced an intent by the parties to incorporate not only principles of New York State substantive law, but also New York State law on arbitration proceedings. The Supreme Court rejected this interpretation. The Court stated:

> We think [*12] the best way to harmonize the choice-of-law provision with the arbitration provision is to read [the phrase] 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus the

> choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.

Mastrobuono, at 63-64. Further, the Court distinguished Volt and explained that "In *Volt*, we did not interpret the contract de novo. Instead we deferred to the California court's construction of its own state's law . . ." Id. at 60[4]

In short, *Mastrobuono* teaches that the mere inclusion in a contract of a standard choice-of-law clause will not be construed as an intent to override the F.A.A. in favor of state arbitration rules. Indeed, recent Court of Appeals decisions in this Circuit have followed the instruction of *Mastrobuono*. *See Nat'l Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 132 (2d Cir. 1996) (declining to read a choice-of-law clause in a contract [*13] as incorporating New York State law on arbitration), *Doctor's Assocs. Inc. v. Distajo*, 107 F.3d 126, 131 (2d Cir.) ("even the inclusion in the contract of a general choice-of-law clause does not require application of state law to arbitrability issues, unless it is clear that the parties intended state arbitration law to apply on a particular issue"), cert. denied, 522 U.S. 948, 118 S. Ct. 365, 139 L. Ed. 2d 284 (1997).

The joint venture entered into by Circle and Parke is analogous to the contracts in the cases cited above. The agreement contains an arbitration provision as well as a separate, broadly worded choice-of-law clause. n4 Consistent with *Mastrobuono* and the Second Circuit caselaw subsequent to it, this Court declines to find in this broad choice-of-law clause a clear intent to incorporate

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[4]The choice-of-law clause, contained in P 22 provides: "this joint venture agreement shall be interpreted in accordance with, and the rights of the parties hereto shall be determined by, the laws of the State of New York."

New York State arbitration law. Therefore, this Court finds that the F.A.A. is the applicable law in this case.

II. Standard For Vacatur Under The F.A.A.

Having concluded that the statute governing the instant case is the Federal Arbitration Act, this Court must analyze Circle's arguments in terms of that statute. Section 10(a) of the F.A.A. states in pertinent part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-
>
> . . .
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers.

Circle in essence alleges that the arbitrator's acts and omissions in this case constitute both "misconduct in refusing to hear evidence" under § 10(a)(3) as well as exceeding his powers in violation of § 10(a)(4).

"Under the F.A.A., the validity of an [arbitration] award is subject to attack only on those grounds listed in § 10, and the policy of the F.A.A. requires [*15] that the award be enforced unless one of those grounds is affirmatively shown to exist." *Wall Street Assoc. v. Becker Paribas Inc.*, 27 F.3d 845, 849 (2d Cir. 1994).

Furthermore, "the showing required to avoid summary confirmation of an arbitration award is high, and a party moving to vacate that award has the burden of proof" *Willemijn Houdstermaatschappij, BV, v, Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997). *See Folkways Music Publishers v. Weiss,* 989 F.2d 108, 111 (2d Cir. 1993) ("the party challenging the award bears a heavy burden of proof"). Courts have pointed out that "under Second Circuit jurisprudence in this area, court review is very narrowly circumscribed to avoid undermining the raison d'etre of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Matter of the Arbitration between Zahid Ashraf and Shahida Zahid and Republic New York Sec. Corp.*, 14 F. Supp. 2d 461, 1998 WL 427616, at *3 (S.D.N.Y. July 28, 1998) (citing *Folkways Music Publishers v. Weiss,* 989 F.2d at 111). Finally, the Second Circuit has noted that "If there [*16] is even a barely colorable justification for the outcome reached, the court must confirm the arbitration award." *Houdstermaatschappij*, 103 F.3d at 13. Mindful of these principles, the Court now turns to consider the motion to vacate and confirm the arbitration award.

A. Refusal To Hear Evidence

In evaluating vacatur motions for "refusing to hear evidence" under § 10(a)(3), courts have stated that "an arbitration award will be vacated on this ground only if the losing party shows that he was denied a fundamentally fair hearing and consequentially suffered prejudice." *Grinnell Hous. Dev. Fund Corp. v. Local 32 B-32J SEIU*, 767 F. Supp. 63, 67 (S.D.N.Y. 1991). The cases where courts have found that a petitioner had been denied "fundamental fairness," because the arbitrators had refused to listen to testimony, typically involved an overt and express refusal by the arbitrators to consider evidence. *See Tempo Shain Corp. v. Bertek Inc.*, 120 F.3d 16, 19 (2d Cir. 1997).

Here, by contrast, Circle has not demonstrated that such an express refusal to hear or consider its evidence occurred. Five days

of hearings were conducted. During these [*17] proceedings, the arbitrator accepted Circle's documentary evidence at the hearings and looked at the evidence as testimony relating to it was given. The two sets of post-hearing briefs provided Circle with an additional opportunity to discuss the significance of its documentary exhibits. Circle has failed to provide evidence demonstrating that it was denied a "fundamentally fair hearing and consequentially suffered prejudice." *Grinnell*, 767 F. Supp. at 67.

Furthermore, in the case at bar, Circle has not made the "high showing" it must in order to warrant vacatur of the arbitrator's award. *Houdstermaatschappij*, 103 F.3d at 12. Indeed, Circle has introduced no evidence, other than its own speculation, to support its claim that the arbitrator intended to defer examination of significant documentary evidence to a time other than the hearing. Moreover, it is entirely possible that in the end, either the AAA or the arbitrator did discover the missing documents and review them before issuing his award. However, without an affirmative showing that the arbitrator turned a blind eye to evidence that could have changed his mind -- Circle has failed to sufficiently [*18] establish "misconduct for refusal to hear evidence" under either § 10(a)(3) or AAA rules 29 and 31.

B. Exceeding Of Powers

Similarly, Circle argues pursuant to § 10(a)(4) that the arbitrator exceeded his powers by violating AAA rules 31 and 32. Specifically, Circle states that the aforementioned AAA rules were violated by the arbitrator's acceptance of Parke's duplicates without first allowing Circle to inspect them. However, Circle can only prevail on this basis "if it is clearly established that the arbitrator has exceeded his authority or imposed his or her own brand of justice." *Matter of Carina Int'l Shipping*, 961 F. Supp. 559, 564 (S.D.N.Y. 1997).

In the instant action Circle has failed to "clearly establish" that AAA rules 31 and 32 were indeed violated. Id. Importantly, the

documents were duplicates of exhibits entered into evidence at the hearing which the arbitrator saw and personally marked. There was, thus, no need for Circle to inspect them a second time. Circle does not buttress, with any specific evidence, its implicit suggestion that Parke surreptitiously introduced new evidence that had not been subject to cross-examination. Nor does [*19] Circle address Parke's argument that the arbitrator would have recognized a document, which had not been previously marked into evidence and about which there had been no testimony. Furthermore, the idea that Parke would attempt to sneak in new documents seems particularly far-fetched in light of the fact that counsel for Parke expressly cautioned the arbitrator in his April 18, 1997 fax to accept only copies of documents that had been previously marked into evidence.

Under the circumstances of this case, this Court cannot conclude that AAA rules 31 and 32 were violated. Having found that no AAA rules were broken, this Court finds that Circle has likewise failed to establish that the arbitrator exceeded his powers within the meaning of § 10(a)(4).

CONCLUSION

For the reasons outlined above, Circle's petition to vacate the arbitration award is hereby dismissed and Parke's motion for confirmation of the arbitration award is hereby granted. Accordingly, final judgment is hereby entered in favor of Parke in the amount of $ 146,590.00 plus interest at the rate of eight percent (8%) per annum from the date of the award to the date of the payment, which represents the award rendered [*20] by the AAA.

SO ORDERED.
Dated: Brooklyn, New York
October 8, 1998
Sterling Johnson, Jr.
U.S.D.J.